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No. 544

In the Supreme Court of the United States

OCTOBER TERM, 1934

HARRY BERGER,

Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER IN REPLY

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STATEMENT

This brief is submitted in reply to a point raised by the respondent in his brief in opposition. The principal points, questions and opinions have been set forth in the petitioner's brief.

ARGUMENT

The respondent has raised the question whether the bill of exceptions was signed and filed in time. Sentence

was imposed on the defendant on March 27, 1934. The bill of exceptions was settled and filed on August 23, 1934. Stipulations were from time to time entered into between the United States Attorney and counsel for the appellant extending the time to "docket this case and file the record" (R. 727, 733, 739, 747). Each stipulation was accompanied by an affidavit of counsel for the appellant (R. 724, 730, 736, 742). Upon these, orders were entered so extending the time (R. 722, 728, 734, 740). The order used was based upon a form furnished by the United States Attorney.

It is true that the orders and stipulations do not use the words "Bill of Exceptions." Yet it is obvious that the intent was that the extension of time embrace both the common law "Record" and the "Bill of Exceptions." In counsel's affidavits reference is first made to the stenographer's minutes (R. 725) which, of course, are essential only to the preparation of a Bill of Exceptions and not a mere Record. Reference is also made to the time needed for preparation of what in effect would be a Bill of Exceptions (R. 725, 731, 733 737, 743).

The intent is also borne out by the telegram of the United States Attorney (Brief for the United States in opposition, Appendix p. 15). He admits assuming that the "order extending time to file record includes filing bill of exceptions."

What should, however, be conclusive is the stipulation settling the Bill of Exceptions (R. 702). Therein it was agreed "That same (the true transcript of the record and evidence) has been prepared *within the time allowed by law and the Court;* and that it may be settled and ordered on file as the Bill of Exceptions herein." (Italics ours.)

The whole difficulty rests upon a question of termin-

ology. The United States Attorney and counsel for the appellant used the word *case* and *record* in the stipulations and orders in the statutory and not the common law sense. Under the New York practice and usage the *case* or *record* embraces everything which must be presented to the appellate court. Locally, the words are, and in the instant case, have been loosely used. The common law *record* prepared by the clerk is clearly different.

It must further be obvious to the court that counsel did not err severely when they failed to use the term bill of exceptions explicitly. "A bill of exceptions is a formal statement in writing of the exceptions duly taken at the trial to the rulings and instructions of the court, with as much of the testimony as is necessary to enable the appellate court to determine whether error was committed in respect to the particular rulings or instructions as to which the exceptions are taken." Zoline's Federal Appellate Jurisdiction and Procedure 3rd Ed. p. 303. It is entirely artificial and the product of counsel. In the instant case, such was not prepared, for the full record of the testimony at the trial has been made the bill of exceptions (R. 702).

In any event, no objection to the settlement and filing of the bill of exceptions was made by the respondent to the District Court. Such settlement proceeded entirely upon an expressed consent. Nor was the question raised in the Circuit Court. Now, when appellant seeks a review in this court, of what appears to be a manifest injustice, the question is raised for the first time. By consenting to the settlement of the Bill of Exceptions (R. 702) and to the filing of the transcript in its present form (R. 749) respondent must be deemed to be estopped from

denying its validity or in any event to have waived any possible objection.

As Mr. Justice White said for this Court in *Waldron* v. *Waldron*, 156 U. S. 361, 378:

> "The motion to dismiss or affirm is without merit. The signing of the bill of exceptions after the expiration of the term at which the judgment was rendered, was lawful if done by consent of parties given during that term. *Hunnicut* v. *Peyton*, 102 U. S. 333 (26:113); *Davis* v. *Patrick*, 122 U. S. 138 (30: 1090); *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293 (36: 162).
>
> The fact that the bill of exceptions was not handed to counsel for defendant on or before November 15, 1890, does not appear of record, and if it did, *it would be rendered immaterial by the action of the judge below in settling the bill.*
>
> If the bill was not delivered to counsel within the time fixed by the agreement, objection to the failure so to deliver it should have been urged when the bill was settled."
>
> "As to the contention that the appeal was docketed too late, the defendant in error is precluded from relying thereon by reason of his motion here for a new bond, long after the entry of the case on the docket of this court, which was made at the return term."

The waiver of the respondent in the stipulation is clear. (R. 702). Such waiver appears as was approved in *Reliable Incubator & Brooder Company* v. *Stahl* (C. C. A. 7) 102 Fed. 590, 593, where the Court prescribed:

> "* * * or if a waiver of the time is to be asserted, a distinct statement of the fact of consent of counsel * * * or still better, a written agreement indorsed upon or attached to the bill showing that consent."

In *Jennings* v. *Philadelphia etc. Railway Company*, 218 U. S. 255, this Court indicated that such consent as in the case at bar would be sufficient to destroy objections to the record where the bill of exceptions had been settled beyond the term. ("There should be express consent, or conduct which should equitably estop the opposite party from denying that he had consented.")

It must be conceded that the question now presented has not been raised before in this case. Objection should first have been made in the trial court. Not having made it there, the respondent had a second opportunity in the Circuit Court, but failed to take advantage of such opportunity. This Court should not consider objections not pressed or passed upon below. *Duignan* v. *United States*, 274 U. S. 195; *Roberts* v. *Reilly*, 116 U. S. 80, 93.

Aside from the impropriety of now raising this question, the circumstances of this case require that the objection be dismissed. This case deals not merely with the funds and property of litigants but with the liberty and person of a human being. He is threatened with imprisonment based solely upon errors heretofore assigned. In dealing with the liberty of human beings substantial justice is certainly never effected by the assertion of a technical objection to prevent adjudication on the merits. At any rate the defendant was permitted to go to the expense and effort of printing and preparing a voluminous record; to draw a brief and argue the case in the Circuit Court, and then to prosecute this application here. The silence and written consent of the respondent cannot be avoided. Such at least compel this case to be taken out of the harsh general rule.

Cudahy Packing Co. v. *City of Omaha*, 24 F. (2d) 3, 7 (C. C. A. 8);
Davis v. *Patrick*, 122 U. S. 138;
Western Dredging & Imp. Co. v. *Heldmaier*, 116 F. 179 (C. C. A. 7);

U. S. v. *Breitling*, 20 How. 252;
Hume v. *Bowie*, 148 U. S. 245;
Taylor v. *U. S.*, 286 U. S. 1;
Ex Parte Chauteaugay Ore & Iron Co., 128 U. S. 544.

Further, the technical objection raised by the respondent may be opposed by another technicality. Respondent says the Bill of Exceptions was not signed and filed in time. The record says otherwise (R. 702). Nothing in the record disputes this. Respondent relies upon an appendix to its brief. That is clearly improper. The Court cannot consider any facts not presented in the record. The record imports absolute verity and cannot be contradicted by a statement or even an affidavit which counsel files in the cause. *Johnson* v. *United States*, 225 U. S. 405; *Evans* v. *Stettinich*, 149 U. S. 605; *Bates* v. *Coe*, 98 U. S. 31.

CONCLUSION

For the reasons herein stated, the technical objection of the respondent should be given no weight, and for the reasons hereinbefore submitted, the writ of certiorari should be granted.

December, 1934.

Respectfully submitted,

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